Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS E. HAUERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this court should grant *certiorari* to resolve a conflict between the Courts of Appeals for the Second and the Seventh Circuits as to whether a jury instruction defining good faith as a defense to the element of willfulness in a criminal tax prosecution must, in order to comply with this court's decision in *Cheek v. United States*, inform the jury that good faith is to be determined according to the subjective belief of the defendant and need not be objectively reasonable.

2. Whether, pursuant to Rule 701 of the Federal Rules of Evidence and in light of this court's decision in *Cheek v. United States*, a defendant who asserts good faith belief as a defense to the element of willfulness in a federal tax prosecution is entitled to present lay testimony corroborating the development and sincerity of his beliefs regarding his tax liability, including opinion testimony as to his sincerity.

3. Whether jury argument in a federal tax prosecution was so misleading as to require reversal despite the sustaining of a prompt objection where the United States Attorney argued to the jury that defendant's acquittal on criminal charges for willful failure to file returns and pay taxes would negate his civil liability for unpaid federal income tax.

PARTIES

There are no parties to this action other than those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas E. Hauert, by his attorney Raymond D. Pijon, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Seventh Circuit Docket No. 93-3171) is published as *United States v. Hauert*, 40 F.3d 197 (7th Cir. 1994). A copy of the opinion included in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1994. No petition for rehearing has been filed in the Court of Appeals. This petition for writ of *certiorari* is being filed within ninety days of the entry of judgment in the Court of Appeals.

The jurisdiction of the United States Supreme Court arises under 28 USC § 1254(1). The Court of Appeals had jurisdiction under 28 USC § 1291. Jurisdiction of the District Court arose under 18 USC § 3231.

STATUTES AND RULES INVOLVED

26 USC § 7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to any other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 USC § 7203

Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more 1 years, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

Federal Rules of Evidence, Rule 701

Opinion by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Federal Rules of Evidence, Rule 704

Opinion on ultimate issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible

is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

STATEMENT OF THE CASE

A. Procedural History

The Grand Jury returned an indictment against Thomas E. Hauert in the District Court for the Northern District of Illinois on April 13, 1993. Counts I, III, V, and VII charged Hauert with evasion of income tax for the years 1988, 1989, 1990 and 1991, felonies under 26 U.S.C. §7201. Counts II, IV, VI and VIII charged Hauert with failure to file income tax returns for the same years, misdemeanors under 26 U.S.C. §7203.

The case was tried to a jury before District Judge William T. Hart. The jury returned a verdict of guilty on all counts. Hauert was sentenced under the sentencing guidelines to twelve months in the custody of the United States Bureau of Prisons. Eight days after sentencing, Hauert filed his Notice of Appeal.

B. The Case at Trial—Government's Case-in-Chief

Internal revenue agent Katherine Batory testified that Hauert had income exceeding the minimum filing requirements for the years at issue. (R. 53) She also explained that employees are required to complete a W-4 form to determine how much money the employer withholds for income taxes. (R. 69, 70) When completing this form the employee is permitted certain allowances based upon the

number of exemptions to which he is entitled. (R. 70) If an employee claims exempt status, no money is withheld by the employer. (R. 74)

In March of 1981, Hauert claimed exempt status and signed the W-4 form with the legend "Only under external pressure from IRS" (R. 76) In 1982, he claimed forty-two allowances (R. 78) and wrote on the form "U/duress." (R. 79) For the years 1988 through 1991, the years charged in the indictment, Hauert claimed exempt status. (R. 79-81)

Batory concluded that Hauert owed $3,769 in taxes for 1988, $3,859 for 1989, $1,804 for 1990, and $3,416 for 1991. (R. 84)

Revenue agent Scott L. Means, while working in 1984 or 1985 on a project involving a mining venture, contacted Hauert, one of its partners. (R. 102-104) Means discovered that Hauert was under audit for the tax years 1980 and 1981 and identified a letter received from him which stated, "I have abandoned my constitutional challenge for those years." (R. 107-108) Means sent a memorandum to the Chicago District counsel including a copy of this letter. (R. 110)

Means ultimately determined that the partnership was legitimate and that Hauert's role in the partnership was merely that of an investor and not a principal. (R. 112)

The third and last witness called by the government was Julia May Dewey, an attorney for the Regional Counsel for the IRS. She became acquainted with Hauert in 1984 when she received a Tax Court petition filed by him. (R. 145) In that petition Hauert contended that withholdings made from his wages were sufficient to pay a large portion of the tax owed, but did not claim wages were not taxable. (R. 149)

The tax court rules encourage informal exchanges and settlement between the parties. (R. 151) Hauert raised only the issue of whether the money withheld from his wages should be applied to his tax liability. (R. 153) When asked specifically whether Hauert ever advised her that he wanted to argue that wages weren't taxable, she answered ". . . No, I don't recall anything." (R. 153)

After a meeting with Hauert, Dewey sent a settlement letter. Hauert, acting pro se (R. 162), accepted the settlement terms and signed the decision documents that were enclosed with the letter. These documents were subsequently filed with the Tax Court settling his case. (R. 155)

Dewey conceded that litigants often concede issues in Tax Court matters in order to reach a settlement. (R. 172, 173)

This concluded the government's case.

C. The Case at Trial—The Case for the Defendant

Hauert called five witnesses to testify about their knowledge of his tax beliefs and the opinions they had formed about his state of mind on the subject, based on conversations and personal experiences with him. The government sought to limit the scope of examination permitted of these witnesses by motion in limine to preclude Hauert from eliciting any opinions or conversations concerning his beliefs or sincerity on the subject of taxation. (R. 122) In response, Hauert argued that these witnesses had many conversations with him on the subject of taxation; that for him to convince the jury of his good faith belief the jury had to know this and also hear witness opinion of his sincerity on that issue. The district court, relying on Rule 704(b), which prohibits an expert witness from stating an opinion or making an inference about the defendant's mental state, ruled that a lay witness likewise is precluded from rendering such conclusions. (R. 124, 125)

The court limited the testimony of Hauert's witnesses to their opinion of his truthfulness and their knowledge of his reputation for truthfulness.

Hauert' first witness was Ralph Bias. Bias had lived in Joliet for twenty-four years and during that time had worked for Caterpillar. For three of those years he worked side by side with Hauert (R. 191), and they talked about everything. (R. 192) When Bias stated that Hauert is "somewhat of a standout because of some of the things he believes in," the judge sustained a government objection and admonished the witness that "the only admissible evidence here relates to your opinion of his truthfulness or his reputation for truthfulness, that is all." (R. 193) Bias stated that Hauert has a reputation as a truthful person.

Jim Holman was a supervisor in a metallurgy lab. He lived in the Joliet area for sixteen years and during that time met Hauert at the Faith Bible Church. Over the course of those years, he had many conversations with Hauert and with people who knew him. He personally believed that Hauert was honest and sincere and that he possessed a reputation for honesty in the community.

Richard Dobczyk lived in Joliet all his life. He served on the Faith Bible Church Board of Trustees for twelve years and during that time became acquainted with Hauert, who served as the church treasurer. (R. 199, 200) He conversed with Hauert on board matters and on other subjects during social visits and during their work for the Awana Club. He described Hauert as one of the most truthful and honest people he had ever met. (R. 201, 202)

George Shride lived in Channahon, Illinois, just outside of Joliet, for seventeen years. He had worked for Caterpillar for thirty-eight years. At one time he was Hauert's

supervisor. (R. 203) As a result of his experience he had the opinion that Hauert was a truthful person. (R. 204)

Mario Acosta has lived in Joliet since 1980 and worked as a tool designer at Caterpillar. He came to know Hauert at work, at church, and at social events. (R. 205-207) Acosta testified that Hauert was an honest person. (R. 208)

Hauert testified in his own defense. During his forty-six years he had obtained an associate degree in liberal arts and accumulated thirty-five hours of miscellaneous industrial education classes. He had no formal training in taxation or law. (R. 237) He had worked for Caterpillar for twenty-seven years. His duties had ranged from cleaning weld berries to positions as assembly supervisor, welding supervisor, and machine supervisor. (R. 240) Most of his spare time is spent at the Faith Bible Church or with his family. (R. 241)

Hauert had filed income taxes until 1983. Two and a half years earlier, he was swayed by a conversation with a co-employee who believed that the payment of income taxes was voluntary and not mandatory. (R. 243, 244) Hauert read books, booklets, papers and documents and attended meetings of "The Citizens for Just Taxation". (R. 244, 245, 247)

Meetings were held three to four times a year. Speakers included lay researchers and attorneys addressing specific subjects of tax law. (R. 250) Hauert also read Supreme Court cases. (R. 252) In total, he had devoted 8,000 to 10,000 hours to the subject of taxation. (R. 253)

In 1981, Hauert attached a thirteen-page letter to his 1980 1040 Tax Return. (R. 253) The letter proclaimed that wages were not income under the definition of the Code (R. 256), an opinion that Hauert reached after determining that an income tax is an indirect tax which according to the House Congressional Record of 1943 is a tax on

a privilege. (R. 258, 259) He wrote more than twenty letters restating his position and asking the IRS to respond. (R. 254, 255)

Hauert realized that his position on income taxation was contrary to that of most people. He admitted it was contrary to what he had believed for his first fifteen years as a wage earner. He also admitted that holding such an unpopular position bothered him. (R. 265) On the other hand, he was also bothered by the government's failure to answer his letters posing legitimate questions. (R. 266)

Hauert showed the jury a number of letters that he had written over several years to which he never received a satisfactory response. (R. 268) He persisted in trying to get the government to respond, acting without the intention of violating the law. (R. 269) On December 31, 1983, Hauert went to an IRS office to speak to McKinley Bell, an IRS auditor, about an audit of his taxes for the years 1980 and 1981. (R. 285, 286) At this meeting, Hauert questioned Bell on what law makes him liable to file income tax returns. Bell responded that as an auditor he was unfamiliar with the law. (R. 287)

In summary Hauert testified that, based upon his readings, contacts with the IRS, attendance at meetings and research, he had developed a firm belief that he was not liable for income taxes. (R. 292)

The government's cross-examination established that Hauert made a decision to stop paying income taxes in 1983. The decision was due not to any change in the law, but rather to a change in his understanding of the law. (R. 293-306) The government questioned Hauert about negotiations with Julia Dewey leading to his settlement of a civil tax matter for the years 1980 and 1981. Hauert admitted that he did not raise the issue of wages, or any constitutional issues, with her. (R. 345, 346)

In 1982, Hauert claimed forty-two withholding allowances, which the IRS challenged. After investigation, however, the withholding exemptions were found proper. (R. 349-357) In subsequent years, Hauert filed exempt status on his W-4 form, which precluded his employer from withholding any money from his paycheck.

D. The Case at Trial—Argument

In closing argument, the government told the jury:

> When you consider the testimony of Mr. Hauert, consider that he is an individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated.

Objection to this argument was sustained. (R. 552)

E. The Case at Trial—Jury Instructions

Hauert tendered a "good faith belief" instruction derived from *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991). His proposed instruction read:

> A good faith, honest misunderstanding of the requirements of the law is a defense to the element of willfulness. If you find that the defendant's conduct or beliefs were the result of a good faith, honest misunderstanding of the requirements of the law, you must find the defendant not guilty.
>
> In determining defendant's good faith, you must apply a subjective standard of good faith. That is, you must determine whether the defendant actually believed what he says he believed.
>
> It does not matter whether you consider defendant's belief to be reasonable. The only question for you to decide is whether the defendant's beliefs were honest and in good faith, even if such beliefs are unreasonable.

> If you find that the defendant held his beliefs in good faith, you must find the defendant not guilty.

The District Court rejected petitioner's tendered instruction and instead instructed the jury that:

> If the defendant, in good faith, believed the tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not. (R. 468-472)

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS FOR THE SEVENTH AND THE SECOND CIRCUITS AS TO WHETHER THE "GOOD FAITH DEFENSE" INSTRUCTIONS IN A TAX EVASION CASE MUST, IN LIGHT OF THIS COURT'S DECISION IN *CHEEK v. UNITED STATES*, SPECIFICALLY AND UNAMBIGUOUSLY INFORM THE JURY THAT GOOD FAITH SUFFICIENT TO DEFEAT THE ELEMENT OF WILLFULNESS MUST BE DETERMINED ACCORDING TO THE DEFENDANT'S SUBJECTIVE BELIEFS AND NOT ACCORDING TO THE OBJECTIVE REASONABLENESS OF THOSE BELIEFS.

A grant of certiorari jurisdiction is necessary to resolve a conflict between the Seventh and the Second Circuits regarding the language which must be included in jury

instructions in order to comply with this court's decision in *Cheek v. United States*, 498 U.S. 192 (1991). In affirming petitioner's convictions for willful failure to file federal income tax returns and to pay income taxes, the Seventh Circuit stated:

> We are not prepared to adopt the reasoning of *United States v. Pabisz*, 936 F.2d 80, 83 (2nd Dist., 1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Slip opinion at pp. 10-11

Because the Court of Appeals has made an explicit determination to reject as unnecessary the very language regarded by the Second Circuit as essential for compliance with *Cheek*, and because the form of instruction approved in this case is neither sufficiently specific nor sufficiently free from ambiguity to satisfy the requirements of that decision, this court should allow a writ of *certiorari* and reverse the judgment of the Court of Appeals for the Seventh Circuit.

This case, like *Cheek*, was a prosecution for "willfully" failing to file federal income tax returns and "willfully" failing to pay federal income taxes. The defense was that Hauert firmly, sincerely and in good faith believed that he was not liable to file the returns or to pay the taxes in question.[1]

Although the common-law rule that "ignorance of the law is no excuse" applies to the majority of criminal violations, *Ratzlaf v. United States*, ____ U.S. ____, 114 S.Ct.

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[1] Unlike the defendant in *Cheek*, however, Hauert did not claim that the income tax laws were in any way unconstitutional.

665 (1994), an exception has long been recognized for criminal violations of the federal tax code. As long ago as *Murdock v. United States*, 290 U.S. 389 (1933), this court construed the word "willfully," when employed to define the predicate mental state for criminal tax violations, as an indication that:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. 290 U.S. at 396

Subsequent decisions equated "willfulness" with "a voluntary, intentional violation of a known legal duty," *United States v. Bishop*, 412 U.S. 346 (1971), *United States v. Pomponio*, 429 U.S. 10 (1976).

Under these decisions a good faith, if mistaken, belief in the legality of one's conduct was a defense negating the mental state of "willfulness" required for conviction of certain criminal tax offenses. A conflict among the circuits developed, however, between those which judged good faith solely according to the subjective belief of the defendant, *e.g.*, *United States v. Schiff*, 801 F.2d 108 (2nd Cir. 1986), *United States v. Jerde*, 841 F.2d 818 (8th Cir. 1988), *United States v. Harting*, 879 F.2d 765 (10th Cir. 1989), and those which required that such a belief be not only sincerely held but also objectively reasonable, *e.g.*, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989), *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987).

This is the conflict that was resolved in *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991), where this court held that a defendant could not be convicted of willfully failing to file returns if he held a subjective belief that the law did not impose such a duty upon him. This court observed:

> It is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he had no duty. 111 S.Ct. at 611.

It was the government's burden in this case to establish that petitioner acted "willfully," meaning that he intentionally violated a known legal duty. *United States v. Birkenstock*, 823 F.2d 1026 (7th Cir. 1987); *United States v. Ferguson*, 793 F.2d 828 (7th Cir. 1986). A "good faith" belief is a defense to charges that include willfulness as an element. *United States v. Chen*, 605 F.2d 433 (9th Cir. 1979).

Petitioner Hauert, who had no formal training in taxation or law (R. 237), estimated that he had spent between 8,000 and 10,000 hours in conversing, reading and attending lectures on the subject of income taxation. (R. 253) He wrote more than twenty letters to the IRS setting forth his understanding of the law, doggedly seeking a response to questions he posed about his liability to pay income tax. (R. 255) The absence of an official response made Hauert suspicious and deepened his conviction that he bore no legal responsibility to pay income taxes.

Hauert, while acknowledging that his opinion was "contrary to that of most people" and to the views he himself had accepted for many years (R. 265), believed that wages were not income within the definition of the Internal Revenue Code.[2] (R. 253-259)

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[2] In its original opinion in *United States v. Cheek*, 882 F.2d 1263, 1268-1269, n.2 (7th Cir. 1989), *rvsd, Cheek v. United States*, 498 U.S. 192 (1991), the Court of Appeals noted that "the belief that wages are not income and therefore are not subject to federal income tax laws" was one of the "stock arguments of the tax protestor movement [which] have not been, nor ever will be, considered 'objectively reasonable' in this circuit". Significantly, in

(Footnote continued on following page)

Hauert tendered a "good faith belief" instruction based upon the decision of the Court of Appeals for the Second Circuit in *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991). His proposed instruction read:

> A good faith, honest misunderstanding of the requirements of the law is a defense to the element of willfulness. If you find that the defendant's conduct or beliefs were the result of a good faith, honest misunderstanding of the requirements of the law, you must find the defendant not guilty.
>
> In determining defendant's good faith, you must apply a subjective standard of good faith. That is, you must determine whether the defendant actually believed what he says he believed.
>
> It does not matter whether you consider defendant's belief to be reasonable. The only question for you to decide is whether the defendant's beliefs were honest and in good faith, even if such beliefs are unreasonable.
>
> If you find that the defendant held his beliefs in good faith, you must find the defendant not guilty.

The District Court rejected petitioner's tendered instruction and instead instructed the jury that:

> If the defendant, in good faith, believed the tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income

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[2] *continued*
the same footnote the Court of Appeals distinguished this contention from those which asserted, on one basis or another, that the income tax laws were unconstitutional.

> taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not. (R. 468-472)

On direct appeal the Court of Appeals affirmed Hauert's conviction, concluding that the instruction given was sufficient to comply with *Cheek* and declining to follow the Second Circuit standard as enunciated in *Pabisz*. Recognizing that *Cheek* equated willfulness with the "voluntary, intentional violation of a known legal duty," (slip opinion at p. 10), the Court of Appeals nevertheless concluded that "*Cheek*, in our opinion does not mandate the use of the word 'subjective' or words 'subjective standard' as argued by defendant. It does require the elimination of the words 'objectively reasonable'. . . as applied to a willful violation of a known legal duty." (slip opinion, p. 10)

The Court of Appeals found the instruction adequate as given, observing:

> The district court did eliminate any reference in its instruction to an objectively reasonable standard or to the measure of the conduct of a reasonable taxpayer. We believe the instructions given, taken as a whole, conform to the Supreme Court's requirements in *Cheek*:
>
> > In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. [citation to *Cheek*]

> The jury was adequately instructed about defendant's good faith belief defense, a belief "that the tax laws did not require that he file individual tax returns for a particular year." The district court also instructed the jury that if the government failed to prove beyond a reasonable doubt that he had no such good faith belief, his failure to file a return or pay income taxes for a particular year was not a "willful" violation of his duty. The district court instructed the jury that the government was required to prove a "willful" violation, one that was "voluntary and intentional." (slip opinion at p. 10)

But the instruction given by the District Court was not adequate to comply with *Cheek* for two reasons: first, because it failed to explain to the jury, clearly and unambiguously, that the test of good-faith belief is a completely subjective test in which objective reasonableness has no place; and secondly because the second paragraph of the instruction, given without any basis in the evidence, confused and diluted the message of the first paragraph.

The Second Circuit has sensibly determined that the jury evaluating the good-faith belief defense in a criminal tax prosecution should not be left to speculate as to the standard but should be unambiguously given a correct statement of the law. In *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991), the court held:

> The basic problem with the instruction given is that, on the issue of good faith, the jury was not instructed that it must consider whether Pabisz subjectively believed that he did not need to file income tax returns or pay taxes. . . . Put another way, the court did not instruct the jury that defendant's beliefs need not be objectively reasonable if they were actually held in good faith. 936 F.2d at 83

This is the standard of specificity that the Seventh Circuit clearly and deliberately decided not to follow when it held,

> We are not prepared to adopt the reasoning of *United States v. Pabisz*, 936 F.2d 80, 83 (2nd Dist., 1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Slip opinion at pp. 10-11

The Court of Appeals apparently was of the opinion that the instruction as given made the same point in different words, and that the degree of clarity required by the Second Circuit was to insist upon a mere surplusage of protection. But the Court of Appeals was mistaken. It is true that the instruction in this case cured the earlier error of affirmatively instructing the jury as to an incorrect standard. It still, however, left the jury to speculate whether a good-faith belief sufficient to negate the element of willfulness was in any way limited by the reasonableness of that belief.

That the jury would engage in such speculation is by no means an idle fear. The identical misconception was long entertained by the Seventh Circuit itself when it read an implied condition of objective reasonableness into the *Murdock/Bishop/Pomponio* cases, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989), *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987), *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989).

The instruction given in this case was, essentially, a *Murdock/Bishop/Pomponio* instruction which left the subjective/objective question unresolved. *Pabisz* properly concluded that the *Cheek* decision requires a clear, explicit

and unambiguous instruction. This court should grant *certiorari* and hold that *Pabisz* is the proper statement of the law.

The second paragraph of the District Court's instruction presents a related problem. In that paragraph the court warns the jury that willfulness is not negated by a belief that the tax laws are unconstitutional or by a mere disagreement with the tax laws. Had Hauert testified that he believed the tax laws are unconstitutional, this paragraph would have been warranted, as it was in the *Cheek* case. See also, *United States v. Dykstra*, 991 F.2d 450, 452, 453 (8th Cir. 1993). The record is clear, however, that Hauert affirmatively disavowed any belief that the tax laws are unconstitutional. As for the question of disagreement with the tax laws, the court provided no direction on what constitutes a disagreement. It is certainly possible that the jury took Hauert's subjective belief that the tax laws did not create a liability for him as an indication of such disagreement.

An instruction must have an evidentiary basis, *Velasquez v. United States*, 244 F.2d 416, 420 (10th Cir. 1957). Instructions irrelevant to the facts of the case or concepts unclear in meaning can easily mislead jurors into erroneous speculations. The inapplicable second paragraph given here invited the jury to speculate, contrary to the evidence, that Hauert considered the tax code unconstitutional or that he simply disagreed with the concept of income taxation. An instruction which invites conviction on a theory which lacks evidentiary support is improper and prejudicial. This is particularly so in the case of a *Cheek* instruction, for the distinction drawn by the two sections of the *Cheek* decision between misunderstanding of tax obligations on statutory grounds, which is a defense, and rejection of those obligations on sincere but mistaken constitutional grounds, which is not, is subtle and confusing,

see Cheek, Scalia, J., concurring. The jury could easily have understood the second paragraph as a dilution, if not a virtual negation, of the first.

The good-faith belief instruction approved by the Seventh Circuit in this case would not have passed muster in the Second Circuit, for it is dangerously ambiguous in defining an essential element of criminal tax offenses. This court should grant *certiorari* to resolve a conflict between these circuits over what is necessary for an adequate *Cheek* instruction.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS CREATED A RULE OF EVIDENCE APPLICABLE ONLY TO CRIMINAL TAX CASES WHERE WILLFULNESS IS AN ELEMENT OF THE OFFENSE, ENGRAFTING ONTO RULE 701, WHICH GOVERNS THE OPINION TESTIMONY OF LAY WITNESSES, THE RULE 704(b) PROHIBITION AGAINST EXPERT TESTIMONY AS TO A DEFENDANT'S STATE OF MIND.

Certiorari should be allowed because the Court of Appeals for the Seventh Circuit upheld the improper and prejudicial restrictions which the District Court placed on Hauert's attempt to corroborate his "good-faith belief" testimony.

The sole contested issue at trial was whether or not Hauert's failure to comply with obligations imposed by the internal revenue code was "willful", an essential predicate state of mind for criminal conviction.[3] He testified that in his judgment, developed after extensive study of the revenue code over the course of a decade, he was not liable to pay income taxes or to file income tax returns. The defense at trial contended that Hauert's belief

[3] See Argument I, *supra*.

was held sincerely and in good faith so as to negate the element of willfulness.

The government sought to prove that Hauert was motivated by a grudge against the Internal Revenue Service and ceased to file returns or pay taxes because he was disgruntled by the outcome of a civil tax dispute.

Hauert sought to introduce the testimony of five longtime friends and acquaintances that:

> 1) his interest in the subject of income taxes was of long standing and virtually a preoccupation;
>
> 2) his conviction that he was not liable for taxes was, in the opinion of these witnesses, sincerely maintained;
>
> 3) he enjoyed an excellent reputation for truthfulness and was, in the opinion of the witnesses, a truthful person.

The District Court permitted Hauert's witnesses to testify only as to the third of these propositions, completely forbidding inquiry into the other two. Cf., *Carter v. United States*, 252 F.2d 608, 617, 102 U.S. D.C. 227 (1957). The witnesses, Ralph Bias, Jim Holman, Richard Dobczyk, George Shride and Mario Acosta, were longtime residents of the Joliet area who had known Hauert as an employee for Caterpillar, as a member of the Faith Bible Church and as a member of the community. Some had worked with him for years, some served with him on the church board and some socialized with him and his family. Each held the opinion that Hauert was a truthful and honest person and that he was so regarded by his peers. (R.189-208)[4]

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[4] Prior to trial, Defendant Hauert was examined by Dr. Lyle Rossiter, a psychiatrist. The government was given notice of the

(Footnote continued on following page)

Hauert proposed to question these witnesses beyond the limited scope permitted in testimony to establish character and reputation.[5] He sought their observations and opinions of his sincerity in the beliefs he espoused on taxation, based on face-to-face discussions on the subject combined with their judgment on his character. (R 122,123) Such opinions and judgments are the kind lay people are capable of forming and that they do in fact form every day. They would have aided the jury in making its decision, not usurped its decision-making function as might the opinion of an expert. See, *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986).

Under Rule 701, a witness, not testifying as an expert, may render opinions or draw inferences which are: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Rule 704(a) permits opinion or inference that embraces an ultimate issue, provided it is not the opinion of an expert testifying about

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[4] *continued*
results of Dr. Rossiter's examination and the defendant's intent to call him as an expert witness. The substance of Dr. Rossiter's opinion was that Hauert was "credible, sincere and manifests a good faith belief and understanding concerning his perceived obligations under the Internal Revenue Code." (C. 24)

The government moved to exclude Dr. Rossiter's testimony on the grounds that Federal Rule of Criminal Procedure 704(b) prohibits an expert witness from testifying with respect to the mental state or condition of a defendant in a criminal case. (C. 24)

Recognizing the special limitations imposed upon opinion evidence by an expert witness under Rule 704(b), Hauert chose to forego Rossiter's testimony and instead sought to present opinions of lay witnesses under Rule 701.

[5] Although the Court of Appeals mentions the absence of a formal offer of proof, the opinion itself makes clear that the anticipated testimony of the defense witnesses was explained to the District Court in colloquy with counsel.

the mental state or condition of the defendant. These rules broadened the law set in earlier cases by permitting the introduction of more evidence than was formerly admissible. Greater reliance is placed on cross-examination to test the validity or weight of the opinion. See, *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981), cert. den. 102 S.Ct. 1017, 454 U.S. 1150, 71 L.Ed.2d 305, FBI agents testified that the defendant was sane at the time of the offense; *United States v. Juvenile Male*, 864 F.2d 641 (9th Cir. 1988), lay testimony on intent based on observations of the defendant wielding a knife and had exposed genitals; *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), lay testimony of ownership, a key issue in the case, based on personal knowledge as secretaries; *United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972), lay testimony permitted on observations and opinions as to insanity, the defense in the case.

A good faith defense rests upon the jury's understanding of the defendant's subjective state of mind. A defendant needs to develop his character and beliefs through independent evidence by witnesses who have had opportunity to make reliable observations of his conduct. See, *United States v. McClintic*, 570 F.2d 685, 689, 690 (8th Cir. 1978). Such evidence should be liberally admitted. *United States v. Alden*, 476 F.2d 378, 385 (7th Cir. 1973).

Ordinarily, the decision of the trial court to exclude evidence will not be overturned on review unless the error was an abuse of discretion. But the rule is not applicable in this case because the court never exercised any discretion. It believed that the evidence was precluded by Rule 704(b).[6]

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[6] "Now, it is true that 704(b) is cast in term of the opinion of an expert witness, but by extension I think a reasonable exten-

(Footnote continued on following page)

In affirming Hauert's conviction the Court of Appeals did not explicitly adopt the reasoning of the District Court but reached the same result implicitly incorporating Rule 704(b) into Rule 701. The Court of Appeals first held that the disputed opinion testimony was inadmissible if offered "to show Hauert's knowledge, or lack thereof, about filing returns and reporting wages and other receipts as income." (slip opinion, p. 7) It went on to note that to the extent the witnesses were called to express an opinion as to Hauert's honesty and to establish his general reputation for truthfulness, the testimony was allowed. (Slip opinion, p. 7) With these observations petitioner has no quarrel.

The Court of Appeals went on, however, to uphold the preclusion of the very testimony that would have corroborated Hauert in his good faith testimony and in responding to the government's assertion of a "grudge" motive:

> While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. *We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here.* In this case, such testimony was not helpful to the jury. (Slip opinion, p. 8, emphasis supplied)

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[6] *continued*
sion is that nor may any lay person testify to whether or not the defendant did or did not have the mental state or condition constituting an element of the crime charged." (R. 124)

This ruling creates a special exception applicable only to so-called "tax protestor" cases by which the limited restriction of Rule 704(b) is engrafted, without authority or reasonable basis, onto the general standard of Rule 701 which would permit the testimony offered here by Hauert to corroborate his defense. Furthermore, once the government introduced the unnecessary subject of Hauert's motivation it opened the door to a complete response. Due process requires that a defendant have an opportunity to respond to the evidence or argument of the prosecution, *see Skipper v. South Carolina*, 476 U.S. 1 (1976), *Gardner v. Florida*, 430 U.S. 349 (1977), *Simmons v. South Carolina*, ____ U.S. ____ (1994).

III.

THE COURT OF APPEALS FOUND NO REVERSIBLE ERROR IN THE PROSECUTOR'S JURY ARGUMENT EVEN THOUGH THE ASSISTANT UNITED STATES ATTORNEY MISINFORMED THE JURY THAT ACQUITTAL ON CRIMINAL TAX CHARGES WOULD ABSOLVE THE DEFENDANT OF LIABILITY FOR HIS UNPAID TAXES.

"Good faith" is an affirmative defense. In order to assert this defense, the defendant must produce sufficient evidence to satisfy the court there is a basis for the defense before a jury instruction is permitted. In this requirement, a good faith defense is no different from any other special, affirmative defense. In such a defense, it is the defendant's burden to produce sufficient evidence to raise the defense; however, once the defendant has satisfied that burden, the burden shifts to the government to disprove the defense beyond a reasonable doubt. *United States v. Bailey*, 444 U.S. 394, 415 (1980); *United States v. Falcon*, 766 F.2d 1469, 477 (10th Cir.1985) (defense of duress); *United States v. Richardson*, 588 F.2d 1235, 1239

(9th Cir. 1979) (defense of necessity); *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir.) cert. denied 474 U.S. 831 (1985); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) cert. denied 474 U.S. 1064 (1986) (defense of entrapment).

In *Walker v. Endell*, 828 F.2d 1378 (9th Cir. 1987), amended, 850 F.2d 470 (9th Cir. 1987), cert. denied, 109 S.Ct. 309 (1988), the Court noted that if a defense negates an element of the crime, rather than mitigating culpability once the crime is proven, it would be unconstitutional to put the burden for proof on that defense on the defendant. (850 F.2d at 472)

The government shifted the burden to Hauert by the following argument made during its rebuttal summation:

> When you consider the testimony of Mr. Hauert, consider that he is an individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated. (R. 552)

Hauert's objection to this argument was sustained.

The government's argument was susceptible of only one, doubly inaccurate, meaning: that Hauert bore the burden of proof on the issue of good faith belief and that if the jury were to acquit Hauert on the criminal charge of willful failure to file returns or pay taxes, Hauert would be free of the civil liability to pay those taxes. He would, in the prosecutor's words, be "home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated." (R. 552) A more flagrant and prejudicial misstatement of the law is difficult to imagine. These words convey only one rational meaning: that if Hauert were found not guilty on the criminal charges he would be exempt from paying his back taxes.

The Court of Appeals was satisfied that an objection to this argument was sustained. The cure was inadequate. *Certiorari* should be allowed and the judgment of the Court of Appeals reversed.

CONCLUSION

Wherefore, Petitioner Thomas Hauert respectfully asks this court to grant a petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit, and that on review it reverse the judgment of the Court of Appeals and order a new trial in this cause.

Respectfully submitted,

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